FILED
APR - 9 2004
OFFICE OF THE CLERK

No. 03-1270

In the
Supreme Court of the United States

JAMES MASON, *et al.*,
Petitioners,
v.
THE AMERICAN TOBACCO COMPANY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF SENATOR CHARLES E. GRASSLEY IN SUPPORT OF PETITIONERS

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MOTION OF SENATOR CHARLES E. GRASSLEY FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

The Honorable Charles E. Grassley, senior Senator from Iowa, respectfully moves for leave to file the attached brief *amicus curiae* in support of the petition for writ of certiorari filed in this case.

Consent to the filing of this brief has been granted by the petitioners and by respondents Phillip Morris, R.J. Reynolds, Brown & Williamson and Lorillard. Those consent letters have been filed with the Court's Clerk. Counsel for Liggett and the Brooke Group, which were named as defendants in the courts below, has not responded to multiple letters and phone calls. The undersigned counsel for Senator Grassley has been informed by the other parties that neither Liggett nor the Brooke Group actively participated in the appellate proceedings below, and further that neither Liggett nor the Brooke Group will be responding here to the petition for a writ of certiorari.

Given that (1) Senator Grassley has received consent from all of the parties participating in the proceeding before this Court; (2) the Senator appeared as *amicus curiae* in the court below, both on the merits and on the petition for rehearing; and (3) the Senator was the author of the superseding legislation that overruled the decision below and that consequently is the centerpiece of this case, *amicus* respectfully seeks leave to file the attached brief. The decision below eviscerates a major federal statute enacted to safeguard the United States Treasury and constitutes a judicial usurpation of the policy-making power reserved to Congress by Article I of the Constitution. *Amicus* believes that the insights and perspective of the author of the legislation at issue here would be of assistance to the Court in ruling on the petition.

Respectfully submitted,

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INTEREST OF *AMICUS CURIAE*

Amicus curiae, the Honorable Charles E. Grassley, senior Senator from Iowa, is the Chairman of the Senate Finance Committee, which has exclusive jurisdiction over Medicare in the Senate.[1] Senator Grassley has been the strongest supporter in Congress of the role of citizens as "private attorneys general" in protecting the Treasury.[2] The purpose of the Medicare as Secondary Payer ("MSP") statute – to stem the flow of Medicare dollars when others should be paying a beneficiary's medical bills – is of great importance to Senator Grassley, who has long advocated vigorous implementation of the MSP statute.[3]

Senator Grassley participated as an *amicus* in the court below, both on the merits and on the petition for rehearing. After announcing its restrictive reading of the MSP statute, the Second Circuit quoted Senator Grassley's *amicus* brief and invited Congress to address the issue if it disagreed with the court's

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[1] No counsel for any party authored any part of this brief, which was financed and prepared by *amicus curiae* and its counsel. Printing was paid for by Parry, Romani, DeConcini & Symms.

[2] In 1986, *Amicus* sponsored the amendments to the False Claims Act ("FCA"). The "most sweeping" reform involved the FCA's *qui tam* provision, expanding the role of private citizens in enforcing the Act. *See* John T. Boese, CIVIL FALSE CLAIMS AND QUI TAM ACTIONS, 1-23 (Aspen Law & Business 1999). "The effect of the 1986 Amendments has been to transform the False Claims Act into an effective and widely used weapon against government-related fraud." *Id.* at 1-25.

[3] *Amicus* introduced the "Medicare Funds Recovery Act of 1992" to increase funding for MSP enforcement. He noted that "Medicare contractors have MSP backlogs of claims mistakenly paid totaling over $1 billion," and that "over $2 billion owed to the Government may never be collected." 138 CONG.REC. S3301, S3319 (Mar. 11, 1992).

interpretation. App. 15a.[4] In response, Senator Grassley introduced the Clarifying Amendments to correct erroneous readings of the MSP statute by the court below and others. In this case, the Court will decide whether the scope of the MSP statute will be severely constricted and its contribution to the continued viability of Medicare diminished. Senator Grassley is interested in making sure that does not happen.

SUMMARY OF ARGUMENT

Congress enacted the Clarifying Amendments specifically because of the lower courts' misreading of the Medicare as Secondary Payer ("MSP") statute. Despite that intervening and superseding legislation, the United States Court of Appeals for the Second Circuit refused to vacate its decision or to rehear the case, and summarily rejected the Amendments as having no impact on its judgment.

The Second Circuit held that liability under the MSP statute is limited to (1) insurance entities; (2) self-insured plans with established formal procedures, separate funds and independent fiduciaries; and (3) contractual insurance obligations, and that MSP liability cannot arise from tort litigation. All of these propositions are refuted by the text of the MSP statute itself, by authoritative agency regulations (to which the Second Circuit flatly refused to defer), and by Clarifying Amendments enacted by Congress in response to the decision below.

The Second Circuit's decision tears a gaping hole in the statutory framework that guards the federal Treasury and the financial integrity of Medicare. The damage to the MSP regime wrought by the Second Circuit's erroneous construction of the MSP statute will impair Medicare's financial viability at a time when both Medicare costs and federal budget deficits are

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[4] Citations to the appendix bound with the Petition for Certiorari will be styled "App. __a."

soaring. Indeed, the Trustees of Medicare have just reported that in the last year the projected financial status of Medicare has taken a major turn for the worse. By 2019, the Medicare Trust Fund will be bankrupt.

The original panel decision by the court below might be deemed mere judicial error. But the Second Circuit's refusal to vacate and rehear the case after the panel decision was overruled by a new statute constitutes disregard of Congress's legislative prerogative. A writ of certiorari should issue to summarily reverse the decision below and to remind the lower court of its proper place in the constitutional order.

ARGUMENT

I. THE SECOND CIRCUIT HAS EGREGIOUSLY MISCONSTRUED THE MEDICARE AS SECONDARY PAYER STATUTE.

The court below held that the only permissible basis for a claim under the MSP statute is "'not the pendency of a disputed tort claim, but the established obligation to pay medical costs pursuant to a pre-existing arrangement to provide insurance benefits.'" App. 13a-14a (quoting Respondents' brief). That ruling is wrong in every jot and tittle. It is inconsistent with the MSP statute, it is inconsistent with the agency regulations implementing the MSP statute, and – most dispositively – it has been overruled by congressional enactment of a clarifying statute that the court below ignored.

A. Liability Under The MSP Statute Is Not Limited To "Insurance Entities."

The court of appeals repeatedly opined that Congress intended that the MSP statute apply only to "insurance entities," and not to manufacturers or other types of companies. App. 4a. *See also* App. 7a (liability limited to "insurance companies");

App. 7a ("statute meant primarily for use against insurers") (citation and quotation marks omitted); App. 12a (statute has "never been successfully used to pursue a non-insurance entity") (citation and quotation marks omitted).

That reading defies the plain text of the statute. The MSP statute specifically provides for claims involving a "liability insurance policy or plan (including a *self-insured* plan)." 42 U.S.C. § 1395y(b)(2)(A)(ii) (emphasis added). App. 40a. "Self-insured" means that there is no insurance entity involved and that the defendant has instead chosen to carry its own risk.[5] Therefore, the MSP statute by its terms embraces liability not just for insurance companies, but also for companies that self-insure.[6] And that forecloses further discussion: "If the intent of Congress is clear, that is the end of the matter; for the court . . . must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). Because the MSP statute was enacted to remedy losses to the United States Treasury, it must be construed broadly to achieve its purpose. *See United States ex rel. Marcus v. Hess*, 317 U.S. 537, 541 n. 5 (1943) ("'The

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[5] In a recent report on federal debt collection efforts, the GAO recognized that the MSP statute covers more than just insurance companies. GAO, DEBT COLLECTION IMPROVEMENT ACT OF 1996: HHS'S CENTERS FOR MEDICARE & MEDICAID SERVICES FACES CHALLENGES TO FULLY IMPLEMENT CERTAIN KEY PROVISIONS, 2 (Feb. 2002)(referring to "Medicare Secondary Payer (MSP) debt, for which insurance or *other entities* are primarily financially responsible")(emphasis added)(hereafter GAO REPORT).

[6] The court of appeals acknowledged that the Respondents here have formally represented (in SEC filings, for example) that they have chosen "self-insurance" for tort liability for any medical expenses that their conduct has allegedly inflicted on their customers. App. 9a.

statute is a remedial one . . . and should be construed accordingly.'") (discussing the False Claims Act).

If there were any residual uncertainty on the meaning of the MSP statute, it has been removed by the regulations promulgated by the Center for Medicare and Medicaid Services, formerly the Health Care Financing Administration ("HCFA").[7] By regulation, HCFA has defined "self-insured plan" as "a plan under which an individual, or a private or governmental entity, carries its own risk instead of taking out insurance with a carrier." 42 C.F.R. § 411.50(b). App. 54a. "Plan," in turn, has been defined by HCFA as "any arrangement, oral or written, by one or more entities, to . . . assume legal liability for injury or illness." 42 C.F.R. § 411.21. App. 48a.

Given that HCFA is the agency charged by Congress with implementing the MSP statute, its reading of the statute is authoritative and entitled to judicial deference. *Chevron,* 467 U.S. at 843. "The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." *Morton v. Ruiz*, 415 U.S. 199, 231 (1974). Where, as here, an agency has exercised such a congressional delegation of legislative power through formal rule-making procedures, judicial deference is at its zenith. *United States v. Mead Corporation*, 533 U.S. 218, 229-30 (2001). "Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Chevron,* 467 U.S. at 844. *See also Mead*, 533 U.S. at 229 (a court "is obliged to accept the agency's position").

The Second Circuit dismissed the HCFA regulations as entitled to no weight, characterizing them as merely the "unsupported interpretation of the MSP statute urged by the

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[7] Following the convention adopted by the parties in this case, this brief will refer to "HCFA," not CMS.

federal government." App. 14a. This bizarre ruling is inexplicable. The HCFA regulations are not agency counsel's litigating position – *they are regulations*, and as such they are entitled to judicial deference.

Finally, Congress conclusively resolved any debate about the reach of the MSP statute on November 25, 2003, when it enacted the Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Pub. L. No. 108-173, 117 Stat. 2066 (2003). Section 301(b), entitled "Clarifying Amendments," provides that "[a]n entity that engages in a business, trade, or profession shall be deemed to have a self-insured plan if it carries its own risk (whether by a failure to obtain insurance or otherwise) in whole or in part." App. 32a (to be codified at 42 U.S.C. § 1395y(b)(2)(A)). *See also* App. 99a (Conference Agreement on Amendments) ("The list of primary plans for which conditional payment could be made is also clarified; an entity engaging in a business, trade, or profession would be deemed as having a self-insured plan if it carries its own risk.").

Congress acted out of concern that the lower federal courts were misreading the MSP statute and stultifying the statute's ability to safeguard the U.S. Treasury. The Second Circuit's decision in this case was a principal example of that disturbing trend, and the Clarifying Amendments were proposed and enacted by Congress after the panel handed down its decision but before it denied rehearing.[8] Congress made this clarification effective as of 1980, when "self-insured" was first added to the MSP statute. App. 33a-34a. *See also* App. 98a (Conference Report explaining how legislation has "clarified" the law); App. 100a (statement of Sen. Grassley) (provisions "do not change existing law in this area but . . . clarify the intent of Congress in

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[8] The other erroneous lower court decisions that concerned Congress and that were overruled by the Clarifying Statute were, unsurprisingly, relied upon by the court below and are therefore collected in its opinion. App. 6a-7a, 9a-10a, 12a-13a.

protecting Medicare's resources"). This clarification endorsed and mandated the understanding of "self-insured plan" that has long been applied by HCFA in its regulations.

B. Liability Under The MSP Statute Is Not Limited To Self-Insured Plans With Established Funds, Formal Procedures, And Independent Fiduciaries.

The Second Circuit held that the only self-insurance plans liable under the MSP statute were those with "formal arrangement[s]" for "establish[ing] a fund with an independent fiduciary" and "a formal procedure for processing claims made against that fund pursuant to the terms of the plan" – all of which had to be memorialized in "written documents allocating legal responsibilities and obligations." App. 9a-10a (quotation marks and citations omitted). The court of appeals ruled that the MSP statute required more than "a decision to set aside funds to cover potential future tort liability." App. 10a.

The Second Circuit simply inserted words into the MSP statute that are not there. The MSP statute imposes no such conditions on the self-insured plans that are liable as primary payers to Medicare. The statute says only that MSP liability can attach to a "self-insured plan." App. 40a. The various formal requirements imposed by the court of appeals are its own fabrications.[9]

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[9] Moreover, the Second Circuit's fabrications are odd. The notion that a self-insured plan *must* have a separate fund to pay any liability is certainly not reflected in the law generally. For example, of the various types of funding mechanisms for employee benefit plans under ERISA, "[a] self-insured plan ... pays benefits out of its own funds, but the money comes from the employer's general funds and not from a separate pool." *American Med. Sec., Inc. v. Bartlett*, 915 F. Supp. 740, 742 (D. Md. 1996), *aff'd*, 111 F.3d 358 (4th Cir. 1997).

This is confirmed by the HCFA regulations, which authoritatively define a self-insured "plan" as "*any* arrangement, *oral or written*, by one or more entities, to . . . assume legal liability for injury or illness." 42 C.F.R. § 411.21. App. 48a (emphasis added). Contrary to the Second Circuit's imaginative musings, there are no further requirements.

If there were any lingering doubt on this question, it was dispelled by the Clarifying Amendments, which provide that "[a]n entity that engages in a business, trade, or profession *shall be deemed to have a self-insured plan* if it carries its own risk (*whether by a failure to obtain insurance or otherwise*) in whole or in part." App. 32a (emphasis added). Thus, directly contrary to the holding below, a decision to self-insure and to carry one's own risk, "whether by a failure to obtain insurance or otherwise," is by itself sufficient to create a "plan" that can be liable under the MSP statute. None of the further trappings or formalities posited by the Second Circuit is required.

C. Liability Under The MSP Statute Is Not Limited To Contractual Insurance Obligations, But Can Also Arise From Tortious Conduct.

The Second Circuit held that the MSP cause of action arises only when the primary payer is obligated to pay medical costs "under a contract of insurance, not when the payment obligation arises out of tort litigation." App. 13a (quotation marks and citations omitted).

Let us first address this supposed rule that MSP liability exists only "against entities who renege upon a pre-existing contractual arrangement." App. 13a. *See also* App. 12a (primary plan's responsibility to pay "rests upon contract principles"); 13a-14a (MSP liability exists only when there is an "'established obligation to pay medical costs pursuant to a pre-existing arrangement to provide insurance benefits'"). As demonstrated above, there is no requirement in the MSP statute that there be an insurance policy, therefore MSP liability can plainly exist even

in the absence of "a contract of insurance." App. 13a. Indeed, the text of the MSP statute forecloses any such reading by expressly providing that a primary payer can be *either* a "liability insurance policy" *or* "a self-insured plan." 42 U.S.C. § 1395y(b)(2)(A)(ii). App. 40a. Self-insurance obviously does not involve a contract with anyone else – that's the point of *self*-insurance. Furthermore, the HCFA regulations expressly provide for a claim against a "self-insured plan" under which an entity "carries its own risk *instead of taking out insurance with a carrier*." 42 C.F.R. § 411.50(b) (emphasis added). App. 54a.

The second part of the Second Circuit's holding is that the "MSP was not meant to encompass alleged tortfeasors." App. 13a (quotation marks and citations omitted). *See also* App. 13a (MSP statute does not apply when payment obligation arises out of "tort litigation"); App. 12a ("the question of tort liability is not part of the equation") (quotation marks and citations omitted).

Once again, there is nothing in the MSP statute to support this reading. The statute expressly provides for the possibility of liability by entities that "self-insure[]," App. 40a, and one area in which self-insurance is common is tort liability. The statute sets forth no exclusion of entities that become "responsible" to reimburse Medicare as a result of their negligence or other tortious conduct. It simply states that "*any* entity which is required or responsible (*directly*, as a third-party administrator, *or otherwise*) to make payment with respect to such" medical expenses can be held liable under the MSP statute. 42 U.S.C. § 1395y(b)(2)(B)(ii) (emphasis added). App. 41a. The history of the MSP regime is one of Congress expanding the "pool of defendants subject to citizen suits." *Manning v. Utilities Mut. Ins. Co.*, 254 F.3d 387, 397 n.8 (2d Cir. 2001).

Likewise, there is nothing in the HCFA regulations that precludes MSP liability on the basis of the entity's own tortious conduct rather than on the basis of an insurance policy. Indeed, the regulations (once again) support precisely the opposite interpretation – that tort liability was envisioned as a basis for MSP liability. The regulations provide that a "plan" liable under

the MSP "means any arrangement, oral or written, by one or more entities, to provide health benefits or medical care *or assume liability for injury or illness.*" 42 C.F.R. § 411.21 (emphasis added). App. 48a. The regulations further state that potentially liable "self-insured plans" include, *inter alia*, (1) "a plan under which an individual, or a private or governmental entity, carries its own *risk*," and (2) the Federal government's plan "to pay liability claims under the Federal *Tort* Claims Act." 42 C.F.R. § 411.50(b) (emphasis added). App. 54a.

It is therefore unsurprising that, the Second Circuit's confusion notwithstanding, the lower courts have long held that Medicare is entitled to reimbursement under the MSP statute when the duty to pay is triggered by a tort. *See, e.g., United States v. Baxter Int'l, Inc.*, 345 F.3d 866, 898 n.26 (11th Cir. 2003) (MSP reaches "a self-insured tortfeasor"); *Cochran v. HCFA*, 291 F.3d 775, 778 (11th Cir. 2002) (MSP applies when Medicare paid medical costs related to injuries, "thereby casting the tortfeasor as the primary payer"); *Estate of Foster v. Shalala*, 926 F. Supp. 850, 865 (N.D. Iowa 1996) ("Congress has provided Medicare with a right of direct action against the tortfeasors."); *Denekas v. Shalala*, 943 F. Supp. 1073, 1080 (S.D. Iowa 1996) (under the MSP, the government "has a right to intervene in the action against the tortfeasor"); *Provident Life & Accident Ins. Co. v. United States*, 740 F. Supp. 492, 503 (E.D. Tenn. 1990) (MSP creates liability where Medicare "has paid for or furnished medical treatment for which . . . a *third person in tort*, is primarily responsible.") (emphasis added).

Finally, the MSP statute's application to tortfeasors (and not just to their insurance companies) was confirmed by the Clarifying Amendments, which provide that the "self-insured" "primary plans" that are subject to suit include "[a]n entity that . . . carries its own risk (whether by a failure to obtain insurance or otherwise)." App. 32a.

The Second Circuit held that the Clarifying Amendments did not affect the decision here because they did "not alter the principle, previously recognized, that 'MSP liability attaches

only to an entity that is required or responsible to pay under a "primary plan," a principle inapplicable to the alleged tortfeasors in this case.'" App. 108a (quoting its own opinion in this case at 12a). The "previously recognized" principle (App. 108a) upon which the court below relied was its holding that MSP liability exists *only* with respect to "a preexisting contractual obligation" to pay medical costs. App. 12a. But as demonstrated above, that supposed "principle" is false and flies in the face of the MSP statute and the HCFA regulations.

More important, in the Clarifying Amendments Congress *overruled* the Second Circuit's spurious distinction between contracts of insurance and decisions to self-insure. The latter make an entity just as liable as the former, and the entity "shall be deemed to have a self-insured plan if its carries its own risk (whether by a failure to obtain insurance, or otherwise)." App. 32a. As Sen. Grassley explained, "[W]hen a Medicare beneficiary is injured by wrongful conduct of another entity, that entity's liability insurance or the entity itself, if it has no insurance, or it might be self-insured, is always required to pay first." App. 100a (statement of Sen. Grassley). Senator Grassley was the author and sponsor of the Clarifying Amendments, and this Court has held that the "remarks . . . of the sponsor of the language ultimately enacted, are an authoritative guide to the statute's construction." *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 526-27 (1982).[10]

Contrary to the Second Circuit's analysis, it is irrelevant whether a tortfeasor sued under the MSP statute has "yet to assume the medical costs" of the Medicare recipients in issue. App. 11a. If it has decided to self-insure for tort liability, then the tortfeasor has a statutory "self-insured plan" and is potentially liable under the statute. The fact that a defendant has

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[10] The Clarifying Amendments were contained in the Manager's Amendment offered by Senator Grassley, who was also sponsor and floor manager of the entire bill.

"yet to assume the medical costs" means only that it has not conceded its tort liability nor had it adjudicated, and that the tort claim thus remains disputed and unliquidated. That issue indeed affects the ultimate question of reimbursement of Medicare, but it does not affect the applicability of the MSP statute to tortfeasors alleged to have injured Medicare recipients. In other words, demonstration of a defendant's tort-law "responsibility" to pay the plaintiffs' medical costs is a condition precedent to *reimbursement* of Medicare under the MSP statute, but it is not a condition precedent to a determination that the alleged tortfeasor has a self-insured plan to which the MSP regime is applicable. An entity that has decided to self-insure for tort liability "shall be deemed to have a self-insured plan" and is therefore a "primary plan" under the MSP statute by force of law. App. 32a.

Under the statute, an MSP plaintiff must, of course, prove tort liability in order to "demonstrate[] that [the] primary plan has or had a responsibility to make payment" to Medicare. App. 32a.[11] The Petitioners have acknowledged this. Petition for Writ of Certiorari at 18. But there is nothing in the statute, the regulations, the Clarifying Amendments, or the legislative history to suggest that the MSP plaintiff cannot establish the primary payer's tort liability in the same lawsuit as the payer's liability to reimburse Medicare under the MSP statute. *Amicus* can offer the Court no guidance on the question of Respondents' tort liability in this case, but if such liability is established there can be no doubt that the self-insured Respondents qualify as

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[11] The Clarifying Amendments provide that a "primary plan's responsibility for such payment may be demonstrated by a judgment, a payment conditioned upon the recipient's compromise, waiver, or release (whether or not there is a determination or admission of liability) of payment for items or services included in a claim against the primary plan or the primary plan's insured, or by other means." 32a.

primary payers under the MSP statute and its Clarifying Amendments.

II. By Refusing To Accede To A Congressional Enactment Superseding Its Reading Of The MSP Statute, The Second Circuit Usurped Legislative Authority And Arrogated To Itself Power To Make Federal Policy.

Congress has the power to correct a judicial misreading of its statutes. *Hilton v. South Carolina Public Railways Comm'n*, 502 U.S. 197, 202 (1991) (Congress may "correct" judicial construction of statutes at will); *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989)("Congress remains free to alter what we have done."). As demonstrated above, Congress has done so here with its Clarifying Amendments to the MSP statute.

Such congressional correction was required in this case because both the Second Circuit and the district court below, like other federal courts before them, voiced policy objections to the MSP regime. The rulings below, like those of the district and bankruptcy courts cited in the opinion below, were transparently shaped by judicial frustration over the appearance of the government and its claim for Medicare's expenditures after a settlement of a lawsuit between private parties.

The district court criticized injection of the MSP statute into tort cases, lamenting that "[i]t almost destroyed the attempt to settle the breast implant cases because a federal agency came in and wanted a cut of the proceeds on the grounds they had laid out money for Medicare." Second Cir. Joint Appendix 426. *See also id.* at 428 (district court addressing the Assistant U.S. Attorney)("You make it more difficult to settle these things."). The district court's frustration with the MSP statute was palpable and culminated with its dismissal of the government's position on the MSP statute in support of Petitioners here: "It is a very

compelling argument that you make. I just can't accept it." *Id.* at 426.

The Second Circuit similarly criticized the assertion of MSP claims "against settlement funds established in mass tort cases," App. 5a, and "against the bankruptcy estate of a manufacturer of silicone breast implants." App. 6a. *Amicus curiae* Senator Grassley argued below that the MSP's private right of action was "'fashioned to encourage private attorneys general to assist in this critical initiative to preserve the financial integrity of Medicare.'" App. 5a (quoting brief of *amicus curiae*). But the Second Circuit found this position unpersuasive because of the "terrific amount of precedential baggage" resulting from the supposedly disruptive attempts of the government to use the MSP statute to intervene in tort litigation. App. 5a.

However well-intentioned, such judicial second-thoughts about the wisdom of a congressional enactment or trade-offs with other judicial values have no place in our constitutional system. Striking a balance among various policy objectives is the job of Congress: "[N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice." *Rodriguez v. United States*, 480 U.S. 522, 525-526 (1987).

The courts below objected that the MSP statute "would distort the federal-state substantive tort balance" by creating a "shadow federal tort action in any case where Medicare payments were made on behalf of any person injured by a delict." App. 19a. *See also* App. 13a (plaintiffs "have not offered any compelling, or even colorable reason as to why the MSP statute *should* apply to tort litigation.")(original emphasis).

But surely it does not "distort" federalism for Congress to provide that self-insured tortfeasors, like insured tortfeasors, are liable to the Treasury when their torts impose burdens on Medicare. And even if it did, that choice is nevertheless one Congress – not the courts – is empowered to make:

> [F]ederal judges – who have no constituency – have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: "Our Constitution vests such responsibilities in the political branches." *TVA v. Hill*, 437 U.S. 153, 195 (1978).

Chevron, 467 U.S. at 866.

The courts below also revealed hostility to the MSP's private right of action, akin to a *qui tam* claim. The Second Circuit condemned application of the MSP statute's "heavy remedy of double damages to the context of tort litigation," which the court deemed "harsh." App. 12a, 13a. The district court rejected what it characterized as a "harsh (double recovery) shadow federal tort action." App. 19a.

In this respect the courts below forgot themselves – such policy questions are beyond their jurisdiction. It is Congress that sets policy and makes laws. In the related field of the False Claims Act, 31 U.S.C. § 3729 *et seq.*, this Court has rebuked lower tribunals that took it upon themselves to second-guess congressional judgments about the damage remedies necessary to protect the public fisc. As the Court has ruled with respect to the FCA, the choice of a remedy "which would give full restitution was a problem *for Congress*." *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 552 (1943) (emphasis added). Although the courts below may harbor distaste for the MSP statute and its *qui tam*-style private right of action, Congress saw a need for this particular remedy, and that is the end of the matter. Such a private right of action is

> "passed upon the theory, based on experience as old as modern civilization, that one of the least expensive and most effective means of preventing frauds on the Treasury is to make the perpetrators of them liable to

> actions by private persons acting . . . under the strong stimulus of personal ill will or the hope of gain. Prosecutions conducted by such means compare with the ordinary methods as the enterprising privateer does to the slow-going public vessel."

Id. at 541 n.5 (citation omitted).

Federal courts may not disparage or act in derogation of the MSP statute on the basis of their reservations about the remedy it provides. "Congress has power to choose this method to protect the government from burdens" imposed upon the Treasury by tortious conduct. *Hess*, 317 U.S. at 542. To "nullify the . . . statute because of dislike" of its damages award or its private right of action "would be to exercise a veto power which is not ours." *Id.*

Medicare has paid for the medical expenses of Medicare tort victims through the tax dollars of those recipients' fellow citizens and Medicare is entitled to be made whole under the MSP statute – the policy reservations of federal judges notwithstanding.

III. THE SECOND CIRCUIT'S CONSTRUCTION OF THE MSP STATUTE AS EXCLUDING SELF-INSURED CORPORATIONS FROM LIABILITY TEARS A GAPING HOLE IN THE STATUTORY FRAMEWORK THAT GUARDS THE FEDERAL TREASURY.

By holding that a "self-insured plan" that must reimburse Medicare under the MSP statute includes only a "formal arrangement" which establishes a separate fund, run by an "independent fiduciary," disbursing money through a "formal procedure," App. 9a-10a, the Second Circuit's opinion creates a safe-harbor from MSP liability for a large body of tortfeasors who do not purchase liability insurance, but rely on their own assets to cover their tort risk without constructing such a formal scheme. These entities are commonly large corporations who

have sufficient assets to bear this risk and are therefore precisely the entities who should not be allowed to escape a duty to reimburse Medicare.[12] The panel's decision thus creates a roadmap by which corporate tortfeasors can avoid any responsibility to Medicare.

The panel opinion further narrows the scope of the MSP regime by converting the MSP statute's mandate that a "*liability* insurance policy or plan (including a self-insured plan)" be primary to Medicare, App. 40a (emphasis added), into a requirement that only a "pre-existing contractual arrangement to provide healthcare coverage," App. 13a, meaning a contract "to assume the medical costs of any identifiable group of individuals," App. 11a, triggers the duty to reimburse Medicare. If allowed to stand, the Second Circuit's decision thus transforms the MSP trigger of liability insurance into something very different, health insurance, and threatens to exclude nearly all tort cases from the reimbursement requirements of the MSP statute.

The decision below has enormous adverse consequences for Medicare and the federal Treasury. The importance of Medicare as a source of health care funding for tens of millions of Americans is beyond cavil.[13] The Second Circuit's misreading

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[12] The panel mischaracterized Petitioners' discussion of this phenomenon as if it were intended to be some limiting principle on the MSP cause of action, App. 8a, when in fact it was offered to show how the district court's decision (and now the Second Circuit's decision) would operate at cross purposes with the whole point of the MSP regime – to save Medicare dollars.

[13] "The Medicare program is the second-largest social insurance program in the United States, with 41 million beneficiaries and total expenditures of $280.8 billion in 2003." 2004 ANNUAL REPORT OF THE BOARDS OF TRUSTEES OF THE FEDERAL HOSPITAL INSURANCE AND FEDERAL SUPPLEMENTARY MEDICAL INSURANCE TRUST FUND, *available at* http://www.cms.hhs.gov/publications/trusteesreport/

of the MSP statute deeply undermines that statute's ability to safeguard Medicare's financial integrity. The Justice Department simply does not have the resources to pursue these reimbursement cases on behalf of Medicare. The GAO has reported on the lack of progress that has been made in collecting MSP debts, which "arise when Medicare covers expenses related to accidents, malpractice, workers' compensation, or other items not associated with group health plans that are subsequently determined to be the responsibility of another payer." GAO REPORT at 20. According to the GAO, Medicare "lacks information on the total dollar amount of eligible debts not covered by its current referral instructions to Medicare contractors, and it has not developed a detailed plan or specific time frame for referring these debts." *Id.* at 19. Moreover, Medicare does not even try to collect older MSP debts because it believes it is "not cost-effective to collect them." *Id.* at 16.

Accordingly, the MSP private right of action was enacted "to save the government money by giving private citizens incentives to recover funds erroneously paid by Medicare." *Manning*, 254 F.3d at 397. Even when Medicare itself lacks the information necessary to collect an MSP debt, that information nevertheless exists in the hands of each Medicare beneficiary who may be a tort victim and who, with the incentive provided by the double damages provision of the MSP statute, can be motivated to sue to collect that debt even if it is not cost-effective for Medicare to make the effort, and even if the more cumbersome federal bureaucracy is slow to take action. This very case, for example, was brought nearly two years before the federal government filed its MSP case (along with other claims) against the tobacco companies.

The MSP private right of action, like the *qui tam* provision of the False Claims Act, empowers private citizens to prosecute cases in which the federal government has overpaid. There have

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2004/tr.pdf (hereafter 2004 Annual Report).

been hundreds of *qui tam* cases filed under the FCA each year. In FY 2003, a record $2.1 billion was recovered under the FCA (a 75% increase from FY 2002), and of that sum a staggering 70% was recovered not in suits brought by the government itself but in *qui tam* actions brought by citizens.[14] This case suggests that the promise of the MSP private right of action for recovery of improper Medicare payments may be even greater than the impact of the *qui tam* action in dealing with fraud against the government.

The Trustees of Medicare have recently reported that "the projected financial status of Medicare has taken a major turn for the worse" in just the last year.[15] By 2019, the Medicare Hospital Insurance Trust Fund will be bankrupt.[16] The attack on Medicare's fiscal viability wrought by the decision below could therefore not have come at a worse time. Although *Amicus* cannot offer this Court guidance on the merits of the factual allegations underlying the Petitioners' MSP claims, the immediate consequence of the Second Circuit's flawed decision is to foreclose any day in court for an otherwise legitimate claim that Medicare is entitled to reimbursement of over $100 billion spent for the medical needs of Respondents' alleged tort victims.

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[14] *See* Department of Justice Press Release No. 613 (November 10, 2003), *available at* www.usdoj.gov/opa/pr/2003/November/03_civ_613.htm.

[15] Social Security and Medicare Boards of Trustees, STATUS OF THE SOCIAL SECURITY AND MEDICARE PROGRAMS: A SUMMARY OF THE 2004 ANNUAL REPORTS, *A Message from the Public Trustees, available at* http://www.socialsecurity.gov/OACT/TRSUM/trsummary.html. *See also id., A Message to the Public* ("The financial outlook for the Medicare Hospital Insurance (HI) Trust Fund that pays hospital benefits has deteriorated significantly from last year.")

[16] 2004 ANNUAL REPORT, *supra* note 13 at 12, 20.

In the flush days of budget surpluses, that would have been a steep price to pay for the legislative meddling of the court below. Today, when record deficits place extraordinary demands on our tax dollars – from the medical needs of seniors to the newly acute demands of national security – it is essential that the MSP statute be a powerful tool for ensuring the integrity of the Medicare system.

CONCLUSION

For the reasons set forth above, the Court should issue a writ and summarily reverse the judgment below, or in the alternative set the case for plenary review.

Respectfully submitted,

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April 2004